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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: International Program Group, Inc.

File: B-400278; B-400308

Date: September 19, 2008

Leonard Holzworth for the protester.

Major Matthew J. Kent and Theresa M. Young, Esq., United States Marine Corps, and John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Given the unambiguous language of the applicable statutes regarding the Historically Underutilized Business Zone (HUBZone) and service-disabled veteran-owned small business concern (SDVOSBC) programs, contracting agency, before proceeding with an SDVOSBC set-aside, must first reasonably consider whether the conditions for a HUBZone set-aside exist, and, if they do, agency must proceed with a HUBZone set-aside.

2. Protests challenging agency's decision to acquire services through SDVOSBC set-asides are sustained where the agency failed to reasonably consider the possibility of a HUBZone small business set-aside, by failing to make a reasonable inquiry into the availability of HUBZone small businesses.

DECISION

International Program Group, Inc. (IPG), a Historically Underutilized Business Zone (HUBZone) small business, protests the decision of the United States Marine Corps (USMC) to issue order No. M00681-08-P-0296 on a sole-source basis to Veteran Government Services (VGS), a service-disabled veteran-owned small business concern (SDVOSBC), and to set aside for competition restricted to SDVOSBCs solicitation No. M00681-08-T-0101. Both the order and the pending solicitation are for support services for pre-deployment training exercises.

We sustain the protests.

Background

The two procurement actions challenged by IPG concern USMC requirements for “Block II” pre-deployment training for Marine units at Camp Pendleton, California. “Block II” training involves realistic situational training exercises. IPG is a HUBZone small business that provides pre-deployment training support services, including role players, special effects, and support personnel. During the time period prior to the filing of these protests, IPG was an incumbent contractor providing pre-deployment training support services at Camp Pendleton under a precursor to the order and solicitation challenged here. The order that IPG was fulfilling during that period had been competed as a total small business set-aside. VGS, the firm performing the order at issue in the protest, is an SDVOSBC that also provides pre-deployment training support services and has received orders to provide those services at Camp Pendleton pursuant to competitions conducted as total small business set-asides.

On May 21, 2008, the contracting agency received a requisition for additional Block II pre-deployment training and training support services. This requirement exceeded the value of the simplified acquisition threshold.¹ In determining whether a socioeconomic set-aside was appropriate for the procurement, the contracting agency considered several issues such as which companies would be qualified, the agency’s progress towards its small business contracting goals, and the short lead-time for the procurement. Contracting Specialist’s Supplemental Statement, Sept. 8, 2008, at 1. The short lead-time in particular resulted in the agency first considering a sole-source award to a HUBZone small business. Id. The contracting specialist assigned to the procurement states that he considered a HUBZone sole-source based on his experience that only one HUBZone small business, IPG, had submitted quotes in response to previous solicitations for similar requirements. Id. However, the contracting specialist had concerns related to certain restrictions on HUBZone sole-source awards that caused him to turn his consideration to the possibility of an SDVOSBC sole-source award. Id. at 1-2.

Over the span of time the contracting specialist had worked with the pre-deployment training requirements, only one SDVOSBC, VGS, had received an order for training support services. Id. at 2. Nonetheless, the contracting specialist conducted a small business search to determine whether there were two or more SDVOSBCs interested in performing the work, which would have precluded an SDVOSBC sole-source award. Id. The search identified 25 SDVOSBCs; however, after contacting 22 of the 25 companies, the contracting specialist determined that only VGS was interested in

¹ The order that was ultimately issued to fulfill this requirement had a value of \$159,780.

competing for the contract.² *Id.*; AR, Tab 12, Contracting Specialist's Statement, July 17, 2008, at 1. The contracting specialist therefore recommended an SDVOSBC sole-source award, and the agency issued order No. M00681-08-P-0296 to VGS on June 10. Because no solicitation was issued in connection with this requirement, IPG was initially unaware that an order for a requirement similar to the requirement it was fulfilling had been issued on a sole-source basis to VGS. IPG discovered the order through its own contract work at Camp Pendleton, and filed a protest of the order with our Office on June 16.

Shortly thereafter, the agency received another requisition for Block II training, the value of which also exceeded the simplified acquisition threshold,³ and followed the same decision-making process that had resulted in the sole-source order to VGS. Contracting Specialist's Supplemental Statement, Sept. 8, 2008, at 3. However, in this instance, the agency became aware that a second small business was interested in competing for the requirement—Lexicon, Inc., a woman-owned, SDVOSBC, and HUBZone-certified small business. AR, Tab 12, Contracting Specialist's Statement, July 17, 2008, at 2.

The contracting officer who made the ultimate set-aside decision in this case states that she considered the HUBZone, 8(a),⁴ and SDVOSBC small business programs, and the agency's progress towards its small business contracting goals. Agency Response, Aug. 7, 2008, Tab 1, Contracting Officer's Statement, at 1. In considering the agency's contracting goals, the contracting officer determined that the contracting activity had exceeded its goals, but that its parent activity was below its targets for both HUBZone and SDVOSBC contracting, and was further from its goal with regard to SDVOSBCs. *Id.* On that basis, the contracting officer issued solicitation No. M00681-08-T-0101 as an SDVOSBC set-aside on June 23. IPG filed its protest challenging the solicitation on June 26.

IPG argues that the agency's decisions to proceed on a sole-source basis and to set aside the procurements for SDVOSBCs were improper, and that the agency instead was required to set aside both procurements for HUBZone small businesses. As explained below, we agree that the agency failed to reasonably consider whether the

² However, we note that the contracting officer stated that there had been inquiries from several SDVOSBCs. Agency Report (AR), Tab 6, Contracting Officer's Statement, at 1.

³ Amendment 2 to the solicitation stated that \$250,000 was a rough estimate of the value of the requirement. Amendment 2, June 26, 2008.

⁴ Section 8(a) of the Small Business Act establishes a business development program under which, among other things, competition may be restricted to eligible small disadvantaged business concerns. *See* 15 U.S.C. § 637(a) (2006).

conditions requiring a HUBZone set-aside were present in each procurement and we sustain both protests on this basis.

Small Business Program Requirements

With regard to the HUBZone program, the pertinent statutory provision states that, “[n]otwithstanding any other provision of law,”

a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657a(b)(2)(B) (2006) (emphasis added). This provision is implemented in Federal Acquisition Regulation (FAR) Part 19--Small Business Programs. Mirroring the statutory language, the applicable FAR provision states that a contracting officer “shall set aside acquisitions exceeding the simplified acquisition threshold for competition restricted to HUBZone small business concerns,” FAR § 19.305(a) (emphasis added), when the contracting officer has a reasonable expectation that offers will be received from two or more HUBZone small business concerns and award will be made at a fair market price. FAR § 19.1305(b). The FAR also provides that a contracting officer may, under certain circumstances, award contracts to HUBZone small business concerns on a sole-source basis, FAR § 19.306(a), but that the contracting officer “shall consider HUBZone set-asides before considering HUBZone sole source awards.” FAR § 19.1305(a).

Our Office has interpreted the FAR implementation of the HUBZone program to require that acquisitions above the simplified acquisition threshold be set aside for HUBZone small business concerns if the agency determines that there is a reasonable expectation that offers will be received from two or more HUBZone small business concerns, and that award will be made at a fair market price. SWR, Inc., B-294266, Oct. 6, 2004, 2004 CPD ¶ 219 at 4. Consistent with that interpretation, our Office has also concluded that an agency must make reasonable efforts to ascertain whether it will receive offers from at least two HUBZone small business concerns. USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 5; Global Solutions Network, Inc., B-292568, Oct. 3, 2003, 2003 CPD ¶ 174 at 3.

In contrast to the mandatory language used in the statute and FAR provisions implementing the HUBZone program, the statute establishing the SDVOSBC program provides that

a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and

controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657f(b) (emphasis added). Similarly, the relevant FAR provision states that a contracting officer “may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to [SDVOSBCs],” FAR § 19.1405(a) (emphasis added), when there is a reasonable expectation that offers will be received from two or more SDVOSBCs and that award will be made at a fair market price. FAR § 19.1405(b). The FAR also provides that “a contracting officer may award contracts to [SDVOSBCs] on a sole source basis,” provided that only one SDVOSBC can satisfy the requirement and award can be made at a fair market price, among other requirements. FAR § 19.1406(a).

Thus, unlike the HUBZone set-aside program, which requires a set-aside if two or more HUBZone concerns are interested in submitting offers and award is expected to be made at a fair market price, there is no requirement to set aside a procurement for SDVOSBCs, DAV Prime, Inc., B-311420, May 1, 2008, 2008 CPD ¶ 90 at 3; rather, the decision to proceed with an SDVOSBC set-aside is discretionary with the contracting officer. MCS Portable Restroom Serv., B-299291, Mar. 28, 2007, 2007 CPD ¶ 55 at 5.

The threshold issue in both of IPG’s protests is the relationship between the HUBZone and SDVOSBC programs, specifically, whether a contracting officer must proceed with a HUBZone set-aside provided the listed conditions are present--a reasonable expectation that offers will be received from two or more HUBZone firms and that award will be made at a fair market price--or whether the contracting officer retains the discretion to proceed instead with an SDVOSBC set-aside.

The starting point of any analysis of the meaning of a statutory provision is the statutory language used by Congress. See Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.”). Where the language is clear on its face, its plain meaning will be given effect; that is, if the intent of Congress is clear, “that is the end of the matter.” Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842 (1984). Here, given the unambiguous language of the HUBZone and SDVOSBC statutes (with which the implementing FAR provisions are consistent), we conclude that a HUBZone set-aside is mandatory where the enumerated conditions are met, and that the discretion granted the contracting officer under the SDVOSBC set-aside program does not supersede the mandatory nature of the HUBZone set-aside program. To interpret the statutes otherwise, as in effect creating parity between the programs, would fail to give effect to the clear language of the HUBZone statute, which uses the mandatory term “shall,” not (as in the SDVOSBC statute) the

discretionary term “may.” See Contract Mgmt. Indus., Inc. v. Rumsfeld, 434 F.3d 1145, 1147 (9th Cir. 2006) (holding that the HUBZone program “commands in unequivocal terms that a contract opportunity be designated as a HUBZone set-aside when certain criteria are met”).⁵

Sole-Source Order to VGS

Given our view regarding the relationship between the HUBZone and SDVOSBC programs, we conclude that the agency was required to reasonably consider whether a HUBZone set-aside was warranted before proceeding with the sole-source order to VGS under the SDVOSBC program. The record shows that the agency did not do so.

According to the contracting specialist, due to the urgency of the requirement, he first considered a HUBZone sole-source award, relying on his experience over the previous months that only one HUBZone concern, IPG, had submitted a quotation for a similar requirement, to conclude that there were not two or more HUBZone small businesses interested in submitting quotes. Contracting Specialist’s Supplemental Statement, Sept. 8, 2008, at 1. The contracting specialist did not further inquire into the availability of other HUBZone small businesses before turning to the possibility of pursuing an SDVOSBC sole-source order for the requirement. Id. However, although the contracting specialist also knew from experience that only one SDVOSBC, VGS, had submitted a quote for similar requirements, he nonetheless conducted a small business search to determine if there were two or more SDVOSBCs who could compete for the requirement, as the existence of two or more would have precluded a SDVOSBC sole-source order. Id. at 1-2.

⁵ We solicited the views of the Small Business Administration (SBA) on this issue. The SBA responded that it interprets the applicable statutes and regulations to provide for parity among the HUBZone, SDVOSBC, and other small business programs, such that after identifying qualified participants, the contracting officer has the discretion to choose among the programs based on consideration of the contracting activity’s progress in fulfilling its small business contracting goals, as well as other pertinent factors. SBA Comments at 6. The SBA’s current regulations reflect this view, stating only that the “contracting officer shall set aside [a] requirement for HUBZone, 8(a) or SDVOSBC contracting before setting aside the requirement as a small business set-aside.” 13 C.F.R. § 126.607(b). We are aware that a current FAR Case, 2006-034, Socioeconomic Program Parity, would amend the FAR to more closely align with the SBA’s interpretation. However, we also note that prior to August 30, 2005, the SBA interpreted the statute in a manner consistent with the current version of the FAR. 13 C.F.R. § 126.607(c) (1999). As discussed above, we conclude that FAR § 19.1305 in its current form properly implements the requirements of 15 U.S.C. § 657a(b)(2)(B), with regard to the facts presented here.

As discussed above, consistent with the mandatory nature of the set-aside program, our Office has concluded that an agency must make reasonable efforts to ascertain whether it will receive offers from at least two HUBZone small business concerns. Global Solutions Network, Inc., *supra*, at 3. Although the use of any particular method of assessing the availability of firms for a set-aside is not required, measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may constitute adequate grounds for a decision, so long as the agency undertakes reasonable efforts to locate responsible potential competitors. National Linen Serv., B-285458, Aug. 22, 2000, 2000 CPD ¶ 138 at 2. Our Office regards such a determination as a matter of business judgment, and we will not disturb that determination absent a showing that it was unreasonable. *Id.*

Here, we conclude that it was unreasonable for the agency to fail to make any inquiry into the availability of HUBZone small businesses other than IPG. While the contracting specialist and contracting officer considered their experience with recent procurement history for the requirement, the contracting officer also acknowledged that "recently, small business vendors have developed the capability to offer [these] services," AR, Tab 6, Contracting Officer's Statement, at 1, and "the vendor base for these services has matured." Agency Response, Aug. 7, 2008, Tab 1, Contracting Officer's Statement, at 1. Further, IPG has demonstrated that a routine search for HUBZone firms under the applicable industry code in California would have revealed Lexicon as a potential HUBZone competitor.⁶ IPG Comments at 4. Under these circumstances, we conclude that the contracting staff's reliance solely on recent procurement experience, which may not have reflected an expanded field of HUBZone firms, was inadequate as a means to identify responsible potential HUBZone competitors, and we sustain the protest on this basis.

SDVOSBC Set-Aside

With regard to IPG's protest of the SDVOSBC set-aside, as discussed above, shortly after issuing the sole-source order to VGS, the agency decided to proceed with an SDVOSBC set-aside for its additional requirements, without further considering a set-aside for HUBZone concerns. As with the sole-source award to VGS, we conclude that it was inconsistent with the HUBZone statute and FAR provision for the agency to set aside the requirement for SDVOSBCs without reasonably considering whether a set-aside for HUBZone concerns was required, based on reasonably assessing the availability of HUBZone firms, and we sustain the protest on this basis.

⁶ In fact, Lexicon was one of the 25 firms revealed by the SDVOSBC search; however, it also was one of the three firms on that list which the contracting specialist did not contact.

Recommendations

With regard to the sole-source order to VGS, shortly after the protest was filed the agency exercised its authority to override the statutory stay on contract performance on the basis of the best interests of the United States. See 31 U.S.C. § 3553(d)(3)(C)(i)(I) (2000). When we sustain a protest under those circumstances, our Office is to make recommendations without regard to the cost or disruption related to the agency terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554(b)(2). However, in this case, due to the limited duration of pre-deployment training support services orders, the order for the requirement issued to VGS was completely performed by July 16. As the order is completed and no other meaningful relief is available, we recommend that the agency reimburse the protester its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2008). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

With regard to the second protest, the agency has refrained from issuing an order under the SDVOSBC set-aside. Accordingly, we recommend that the agency undertake reasonable efforts to ascertain whether it will receive offers from at least two HUBZone concerns and award will be made at a fair market price. If the agency's research indicates that these conditions are met, the agency should cancel the current solicitation and reissue it as a HUBZone set-aside. We also recommend that the agency reimburse the protester its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). As with its claim under the first protest, the protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Gary L. Kepplinger
General Counsel